



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

February 20, 2015
PR 15-08

Mark McBurney, Esq.

RE: DesMarais v. Manville Fire Department
May 14, 2014 Complaint

Dear Attorney McBurney:

Your Access to Public Records Act ("APRA") complaint, filed on behalf of your client Mr. Dan DesMarais, against the Manville Fire Department ("Fire Department") is complete. By correspondence dated May 14, 2014, but received on May 29, 2014, you alleged that the Fire Department committed a knowing and willful violation of the APRA when it failed to timely respond to your February 24, 2014 APRA request and that the Fire Department did not have "good cause" to extend the Fire Department's time to respond pursuant to R.I. Gen. Laws § 38-2-3(e).

On August 4, 2014, legal counsel for the Fire Department, Attorney Daniel McKinnon, submitted a substantive response in addition to an affidavit from Chairman of the Manville Fire District Board of Fire Wardens, Mr. Dennis Auclair. Mr. Auclair states, in pertinent part:

"8) I am familiar with Attorney Mark McBurney's request filed February 24, 2014. That request was filed under the APRA.

9) I have read Attorney McBurney's request filed on February 24, 2014 and previously referenced above. I have discussed its contents with various members of the Board of Fire Commissioners as well as with the Manville Fire District's Clerk and Tax Collector/Treasurer.

10) I am familiar with our clerk Melanie Carrier's response to Attorney Mark McBurney's request of February 24, 2014.

11) Based upon my conversation with our clerk Melanie Carrier I am aware that the response referenced in paragraph 12 above [sic] was sent based upon previous advice provided by previous legal counsel.

12) I further am aware of the fact that Ms. Carrier's response of March 10, 2014 was forwarded to Attorney Mark McBurney on the advice of our legal counsel.

13) Predicated on the records available for review as well as my communications with the board members the clerk and the Tax Assessor/Treasurer I submit this affidavit as the Manville Fire District's response to Attorney Mark McBurney's request above referenced. The response is set forth in the same chronological order as Attorney McBurney's request."

You provided no rebuttal and raised no argument that documents provided on August 4, 2014 in response to your APRA request were substantively inadequate.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred or to examine the wisdom of a given statute, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire Department violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or copy such records. See R.I. Gen. Laws § 38-2-3(a). To effectuate this mandate, the APRA provides procedural requirements governing the time and means by which a request for records is to be processed. A public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. If the public body denies the request, a written response detailing the specific reasons for the denial shall be sent within ten (10) business days to the person or entity making the request. See R.I. Gen. Laws § 38-2-7(a). If no response is sent within ten (10) business days, the lack of response will be deemed a denial. See R.I. Gen. Laws § 38-2-7(b). If, for good cause, the public body cannot comply with a records request within ten (10) business days, then the public body may extend the period an additional twenty (20) business days, for a total of thirty (30) business days. See R.I. Gen. Laws § 38-2-7(b).

Here, the undisputed evidence shows that on February 24, 2014, you sent an APRA request via email to the Fire Department Clerk. This correspondence was sent to the

District Clerk at 10:07 am, requested that the Fire Department “consider this an Access to Public Records Act request,” and sought the following:

- “1. MFD minutes regarding, justifying or authorizing the waiving of Manville Fire District taxes for [John Doe],¹ then living at ***.
2. All other records regarding, justifying or authorizing the waiving of Manville Fire District taxes for [John Doe], then living at ***.
3. All documents, including emails, between [John Doe], then living at ***, and MFD Treasurer/Tax Collector Ronald McKenna, then living at ***.
4. Any and all records indicating that any other MFD resident had their fire district taxes waived after [John Doe] had his waived.
5. Any and all records showing that the MFD put its 1977 Maxim Ladder Truck up for competitive bids, including but not limited to newspaper ads commissioned by the MFD.
6. All competitive bids received as a result of the above.
7. All documents regarding the sale of the MFD’s 1977 Maxim Ladder Truck, including the sales contract, transfer of title, and the return of ‘APPARATUS’ license plates to the DMV.
8. Excluding excerpts from the MFD Charter and Bylaws, any position descriptions of the MFD Tax Collector and/or Treasurer positions.
9. Any and all documents regarding any interest bearing account(s) or facilities related to the MFD’s attempt to purchase a new truck from American LaFrance, including particularly, the status and location of such accounts or facilities.
10. The MFD’s policy on gas reimbursement for MFD Board members.”

On March 10, 2014, the Clerk sent you a timely response that stated, in relevant part:

“The Manville Fire District – Public Records Request procedure [] specifically requires that such requests ‘shall be presented in writing, via facsimile or in person’ and further that ‘The request must be presented during ordinary business hours of the district on forms as provided by the district.’

¹ For privacy reasons, we decline to name the particular individual.

Without waiving its right to deny your request based upon your failure to comply with the District's procedures as set forth above, this is to further advise you that I am researching our files to determine if they contain any relevant information and therefor [sic] for good cause, I am extending the District's time for response pursuant to the Act to thirty (30) business days."²

Having received no further post March 10, 2014 response from the Fire Department, you filed the instant APRA complaint. Thereafter, on August 4, 2014, included in the Fire Department's response to this APRA complaint, was the Fire Department's response to your February 24, 2014 APRA request. With the exception of Mr. Auclair's attestation that he was "familiar with [your] request filed on February 24, 2014," that your request "was filed under the APRA," and that "[b]ased upon [his] conversations with [the Fire Department's] clerk Melanie Carrier [he is] aware that the [March 10, 2014 response] was sent based upon previous advice provided by previous legal counsel, the Fire Department provides no explanation for the nearly seven (7) month delay in responding to your request. See Mr. Dennis Auclair's Affidavit. The Fire District also provides no argument or evidence to support the March 10, 2014 averment that your APRA request did not comply with its APRA procedures. Indeed, the undisputed evidence reveals that on March 10, 2014, the Fire Department extended the time to respond to your APRA request and indicated, among other things, that its extension did not waive its ability to deny your APRA request for failing to follow its APRA procedures. After sending the March 10, 2014 extension, however, the Fire Department failed to timely respond to your APRA request within thirty (30) business days. Moreover, even though the Fire Department questions your compliance with its APRA procedures, the evidence shows that your APRA request was presented in writing, clearly indicated that you were seeking records under the APRA, and was submitted to the Fire Department's Clerk during ordinary business hours, all in conformity with the Fire Department's policy.³ Such was

² Included in the March 10, 2014 letter was a copy of the Fire Department's public records request procedures, which in pertinent part states: "A request for inspection or copying of public records shall be presented in writing, via facsimile or in person to the Chairman/Clerk of the Manville Fire District...The request must be presented during the ordinary business hours of the district on forms as provided by the district and must reasonably describe the records sought in a way that will permit their identification and location by district personnel."

³ Per the Fire Department's public records policy, "[t]he request must be...on the forms provided by the district...[.]" While your APRA request was not made on the Fire Department's form, the APRA states that "[a] written request for public records need not be made on a form established by a public body if the request is otherwise readily identifiable as a request for public records." See R.I. Gen. Laws § 38-2-3(d). Your email clearly indicated that you were requesting documents under the APRA and Mr. Auclair's affidavit acknowledges that your request was filed "under the APRA."

precisely our finding in DesMarais v. Manville Fire Department Board of Wardens, PR 12-05, where we previously confronted this issue. Therefore, based on the uncontested evidence, we find that the Fire Department violated the APRA when it failed to respond to your February 24, 2014 APRA request in a timely manner. See R.I. Gen. Laws § 38-2-7.

You further allege that the Fire Department did not have “good cause” to extend the time to respond to your request. See R.I. Gen. Laws § 38-2-7(b). Specifically, you assert that the basis for the March 10, 2014 extension “no where remotely conforms with RIGL 38-2-3(e)’s permitted ‘good cause’ reasons or bases.”⁴ Your APRA request sought access to ten (10) categories of documents with no limiting time frame. Arguably, your request could be considered voluminous, thereby permitting the additional twenty (20) business days to respond. Id. Regardless, even if we were to agree that the Fire Department had “good cause” for the additional twenty (20) business day extension, the undisputed evidence shows that no response was provided until approximately seven (7) months after you filed your APRA request. Since there is no question that even with the extension the Fire Department violated the APRA by failing to timely respond to your request, the issue of “good cause” is unnecessary for us to decide. See R.I. Gen. Laws § 38-2-7(e).

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). Also a court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” See R.I. Gen. Laws § 38-2-9(d). After reviewing all the evidence presented, we have grave concerns regarding the Fire Department’s untimely response and whether such omission should be considered knowing and willful, or alternatively, reckless.⁵

⁴ Pursuant to R.I. Gen. Laws § 38-2-3(e), a public body may extend the time to respond by an additional twenty (20) business days if it can “demonstrate that the voluminous nature of the request, the number of requests for records pending, or the difficulty in searching for and retrieving or copying the requested records is such that additional time is necessary to avoid imposing an undue burden on the public body.”

⁵ The Rhode Island Supreme Court examined the “knowing and willful” standard in Carmody v. Rhode Island Conflict of Interest Comm’n, 509 A.2d 453 (R.I. 1986). In Carmody, the Court determined that:

“the requirement that an act be ‘knowingly and willfully’ committed refers only to the concept that there be ‘specific intent’ to perform the act itself, that is, that the act or omission constituting a violation of law must have been deliberate, as contrasted with an act that is the result of mistake, inadvertence, or accident. This definition makes clear that, even in the

This Department has previously examined the issue of public bodies failing to provide timely responses to APRA requests. In Boss v. Woonsocket Superintendent's Office, PR 13-19 and PR 13-19B, Law Office of Michael Kelly v. City of Woonsocket, PR 13-13 and PR 13-13B, and Kelly & Mancini v. Town of Warren, PR 14-19 and 14-19B, this Department found knowing and willful violations of the APRA, which resulted in lawsuits. Additionally, in Scripps News v. Rhode Island Department of Business Regulation, PR 14-07 and PR 14-07B, we found that the Rhode Island Department of Business Regulation committed a reckless violation of the APRA and a lawsuit was filed.

Furthermore, it is significant that this Department addressed this very issue with the Fire Department in DesMarais v. Manville Fire Department, Board of Wardens, PR 12-05 and OM 12-09. In DesMarais, we found that the Fire Department violated the APRA when it failed to timely respond to your APRA request. Although the Fire Department argued that your emailed APRA request did not conform to its public records procedures, we rejected that argument and found nothing in the Fire Department's policy that prohibited emailed requests. While we declined to file suit in that matter, we did advise the Fire Department that its unlawful conduct could "serve as evidence of a willful or a knowing violation in any similar future situation."⁶ Id. Frankly, at this juncture, it is difficult to distinguish this situation from our prior finding in DesMarais.

Therefore, consistent with this Department's practice, the Fire Department shall have ten (10) business days from receipt of this finding to provide us with a supplemental

criminal context, acts not involving moral turpitude or acts that are not inherently wrong need not be motivated by a wrongful or evil purpose in order to satisfy the 'knowing and willful' requirement." See id. at 459.

In a later case, DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994), the Court expounded on Carmody and held:


"that when a violation of the statute is reasonable and made in good faith, it must be shown that the official 'either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute * * * Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is 'difficult to conceive of a violation that could be reasonable and in good faith. In contrast, when the violative conduct is not reasonable, it must be shown that the official was 'cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt.' (internal citations omitted). Id. at 1164. (Emphasis added).

⁶ Our finding in DesMarais was issued prior to the APRA's 2012 amendments, which added a one thousand dollars (\$1,000) civil fine for a reckless violation. See R.I. Gen. Laws § 38-2-9(d).

explanation as to why its untimely response should not be considered knowing and willful, or reckless, in light of its recognition of the APRA requirements and this Department's precedent, including but not limited to DesMarais. Such a determination by this Department would subject the Fire Department to civil fines. A copy of any and all responses by the Fire Department should be presented to you. If you wish, you may also present evidence or arguments addressing the civil fine issue within the same timeframe, which must also be forwarded to legal counsel for the Fire Department. At the end of this time period, we will issue our supplemental finding on this matter and determine whether civil fines are appropriate.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Malena Lopez Mora
Special Assistant Attorney General
Extension 2307

Cc: Daniel V. McKinnon